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CITATIONS

Cases:

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In the Supreme Court of the United States

No. 72-694

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, ET AL., APPELLANTS

v.

EWALD B. NYQUIST, AS COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The opinion of the three-judge district court (JS 1a–46a) [1] is reported at 350 F. Supp. 655.

JURISDICTION

The judgment of the district court was entered on October 20, 1972 (JS 59a–62a). The notice of appeal was filed on November 3, 1972, and probable jurisdiction was noted on January 22, 1973 (App. 79a–80a). The jurisdiction of this Court rests on 28 U.S.C. 1253.

[1] "JS" refers to the appendix to the Jurisdictional Statement in No. 72-694 of appellants Committee for Public Education and Religious Liberty, et al. "App." refers to the Appendix filed in Nos. 72-694, 72-753, 72-791, and 72-929.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in relevant part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

Chapter 414 of the 1972 Laws of New York is set forth at JS 47a–58a.

QUESTION PRESENTED

The United States will discuss the following question:

Whether the New York statute providing a State income tax deduction to parents who have paid tuition for sending their children to nonpublic (including religiously-affiliated) schools violates the Establishment Clause of the First Amendment as applied to the States under the Fourteenth Amendment.[2]

INTEREST OF THE UNITED STATES

The interest of the United States in improving the quality of education, promoting the maximum availability and utilization of educational resources, and encouraging diversity in the educational system is set

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[2] The related cases, Nos. 72–753, 72–791, and 72–929, consolidated with this case, involve two other issues: whether the New York law violates the Establishment Clause by authorizing grants for the repair and maintenance of certain nonpublic schools, and whether it does so by providing reimbursement to low income parents for portions of nonpublic school tuitions. We do not discuss the first issue; the second issue is discussed in our brief *amicus curiae* in *Sloan* v. *Lemon* and *Crouter* v. *Lemon*, Nos. 72–459 and 72–620, and this will not be repeated here.

forth in the brief of the United States as *amicus curiae* in *Sloan* v. *Lemon* and *Crouter* v. *Lemon*, Nos. 72–459 and 72–620, pp. 2–4, dealing with a closely related question.

The United States has a particular interest in the validity under the Establishment Clause of tax allowances made to parents who pay tuition for their children who attend nonpublic schools. In his State of the Union message to Congress of March 1, 1973, the President stated (Weekly Compilation of Presidential Documents, Vol. 9, No. 9, March 5, 1973, p. 202):

> [I]n order to enhance the diversity provided by our mixed educational system of public and private schools, I will propose to the Congress legislation to provide a tax credit for tuition payments made by parents of children who attend non-public elementary and secondary schools.

The 1974 federal budget provides for "proposed legislation that would provide an income tax credit for tuition paid to nonpublic elementary and secondary schools" (The President's Message to the Congress Transmitting the Budget for Fiscal Year 1974, Weekly Compilation of Presidential Documents, Vol. 9, No. 5, Feb. 5, 1973, p. 95); see, also, *id.*, Vol. 8, No. 46, November 13, 1972, p. 1631 (President's statement in Chicago, Illinois, on November 3, 1972, stating his support for "legislation that will allow the parents of children attending nonpublic schools tax credits to offset a part of their tuition costs," which he described as a "much needed measure to maintain diversity and to keep a strong spiritual and moral element in the American education system").

STATEMENT

This is a suit to enjoin enforcement of Chapter 414 of the 1972 Laws of New York on the grounds that the Act violates the Establishment and Free Exercise Clauses of the First Amendment (App. 7a–15a). The plaintiffs are the Committee for Public Education and Religious Liberty ("PEARL") and individual citizens and taxpayers of New York (some of whom are parents of children attending New York public schools) (App. 8a–9a). The defendants are the Commissioner of Education, the Comptroller, and the Commissioner of Taxation and Finance of the State of New York, all of whom are sued in their official capacity (App. 10a), the Majority Leader and President pro tem of the New York State Senate (App. 73a), and individual residents of New York who are parents of students in nonpublic schools (App. 26a-39a).

THE STATUTE

The New York statute at issue, which was approved May 22, 1972, provides, in Sections 4 and 5, for assistance to parents who pay tuition to send their children to nonpublic schools, by providing for such parents an allowance to reduce their adjusted gross income for New York State income tax purposes.[3]

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[3] Section 1 of the Act authorizes grants for maintenance and repair to nonpublic schools serving a high concentration of pupils from low-income families, for the purpose of insuring a healthy and safe environment for children attending those schools (JS 47a–50a). Section 2 provides for reimbursement to parents with taxable incomes under $5,000 of a portion of the tuition paid to send a child to a nonpublic school. Sections 6

Section 3 of the statute contains legislative findings that nonpublic educational institutions "not only provide education for the children attending them, but by their existence, relieve the taxpayers of the state of the burden of providing public school education for those children," that such institutions are themselves tax exempt, and that income tax laws already provide for the deduction of amounts contributed to such institutions or for education related to employment. Accordingly, "similar modifications of federal adjusted gross income [for use in calculating the State income tax] should also be provided to parents for tuition paid to nonpublic elementary and secondary schools * * *" (JS 53a).[4]

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and 7 provide for an additional payment to a public school district which experiences an increase in enrollment due to the closing of a nonpublic school (JS 55a). Sections 8, 9 and 10 authorize the purchase by a public school district of existing school buildings (JS 56a–58a).

[4] Some findings in Section 2 are equally applicable to the tax deduction provisions of Sections 4 and 5. They state that "[t]he vitality of our pluralistic society is, in part, dependent upon the capacity of individual parents to select a school, other than public, for the education of their children"; and that "[a] healthy competitive and diverse alternative to public education is not only desirable but indeed vital to a state and nation that have continually reaffirmed the value of individual differences." Furthermore, "[q]uality education is made possible for all children in our state only because the burden of providing it has been carried by taxpayers who support both public and nonpublic education [and] [a]ny precipitous decline in the number of nonpublic school pupils would cause a massive increase in public school enrollment and costs * * * [which] would seriously jeopardize quality education for all children and aggravate an already serious fiscal crisis in public education" (JS 50a).

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Sections 4 and 5 of Chapter 414 offer tax relief for the parents of students attending nonpublic schools.[5] Under those sections, parents who have paid at least $50 in nonpublic school tuition for their children are entitled to a reduction of the federal adjusted gross income figure which is used in computing their New York State income tax (JS 53a–54a). The deduction is allowed for each of the first three children attending nonpublic schools in accordance with a table which reduces the allowance as the parents' income increases.[6] (*Ibid.*) Thus, while the deduction is $1,000 for each child (up to three) where the adjusted gross income is less than $9,000, those with incomes in excess of $25,000 receive no deduction (*ibid.*). The estimated net benefits range from $50 per child for

[5] The nonpublic school attended must be providing instruction in accordance with the State's compulsory education laws; not be in violation of Title VI of the Civil Rights Act of 1964 (which prohibits discrimination because of race, color, or national origin); and be entitled to a federal tax exemption under 26 U.S.C. 501(a), (c)(3).

[6] The table is as follows (JS 54a):

If adjusted gross income is—	Income exclusion per pupil 19—	Estimated net benefit to family		
		1 child	2 children	3 or more
Less than $9,000	$1,000	$50.00	$100.00	$150.00
$9,000 to $10,999	850	42.50	85.00	127.50
$11,000 to $12,999	700	42.00	84.00	126.00
$13,000 to $14,999	550	38.50	77.00	115.50
$15,000 to $16,999	400	32.00	64.00	96.00
$17,000 to $18,999	250	22.50	45.00	67.50
$19,000 to $20,999	150	15.00	30.00	45.00
$21,000 to $22,999	125	13.75	27.50	41.25
$23,000 to $24,999	100	12.00	24.00	36.00
$25,000 nny over	0	0	0	0

families with income under $9,000 to $12 per child for families with incomes between $23,000 and $24,999 (JS 36a).

THE DISTRICT COURT DECISION

The three-judge district court held that Sections 1 and 2 of the Act, providing for grants for maintenance and repair of certain nonpublic schools and for tuition reimbursement to low-income families, violated the Establishment Clause, but ruled, with one judge dissenting, that the tax deduction provisions of Sections 4 and 5 were constitutional.

The court summarized the reasons which made the tax deduction system consistent with the Establishment Clause:

> It covers attendance at *all* nonprofit private schools *in the State*. Second, it does not involve a subsidy or grant of money *from the State Treasury* * * *. Third, it has a particular secular intent—one of equity—to give some recompense by way of tax relief to our citizens who bear their share of the burden of maintaining the public schools and who, because of religious belief or otherwise, send their children to nonpublic full-time schools * * *. Fourth, the benefit to the parochial schools, if any, is so remote as not to involve impermissible financial aid to church schools. Lastly, there is a minimum of administrative entanglement with the nonpublic schools. Nor is the on-going political activity as likely, in our opinion, to cause division on strictly religious lines [JS 32a–33a] [emphasis in original].

ARGUMENT

THE NEW YORK STATUTE ALLOWING A TAX DEDUCTION TO PARENTS OF NONPUBLIC SCHOOL CHILDREN SATISFIES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT BECAUSE ITS PURPOSES AND EFFECT ARE PRIMARILY SECULAR, IT PROVIDES NO DIRECT BENEFIT OR PAYMENT TO RELIGIOUS INSTITUTIONS, AND IT DOES NOT INVOLVE EXCESSIVE GOVERNMENT ENTANGLEMENT WITH RELIGION

INTRODUCTION AND SUMMARY

The Establishment Clause was primarily intended to guard against the "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz* v. *Tax Commission,* 397 U.S. 664, 668. The Court summarized in *Lemon* v. *Kurtzman,* 403 U.S. 602, the "cumulative criteria developed by the Court over many years" for determining whether a statute satisfies the Establishment Clause (pp. 612-613):

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education* v. *Allen,* 392 U.S. 236, 243 (1968); finally, the statute must not foster "an excessive government entanglement with religion." *Walz, supra* at 674.[7]

[7] Appellants assert that this Court has applied tests other than those summarized in *Kurtzman* for determining whether a statute satisfies the Establishment Clause. Thus, they state that *Everson* v. *Board of Education*, 330 U.S. 1, announced the principle that a government may not subsidize or finance sectarian instruction (Br., p. 9). However, the plurality opinion of the Chief Justice in *Tilton* v. *Richardson*, 403 U.S. 672, 680, rejected this argument and recognized that the purpose and

The district court correctly recognized that the purposes of the tax deduction sections of Chapter 414 of the 1972 Laws of New York were secular, since they were based on the equitable consideration of providing tax relief to those citizens who help support two school systems. Moreover, they also tend to promote valid state interests in pluralism in education, and in avoiding the fiscal crisis which would be caused by the entry into the public schools of substantial numbers of those now attending nonpublic schools.

Walz v. *Tax Commission,* 397 U.S. 664, indicates that the tax deduction does not have the primary effect of advancing religion. In *Walz,* a tax exemption granted directly to religious institutions provided them with a permissible "indirect economic benefit" (397 U.S. at 674), since tax relief is not sponsorship of religion. Here, where the tax deduction is given to the parents of children in any qualifying nonpublic school, it is still less a sponsorship of religion, and accordingly any economic benefit to religion is corre-

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effect test is controlling. See also *Lemon* v. *Kurtzman,* No. 71-1470, decided April 2, 1973 (slip op., p. 14, n. 7); *Walz* v. *Tax Commission, supra,* 397 U.S. at 670.

Similarly, *Walz* did not establish a "test of time and place" (Br., p. 20). There the Court stated (397 U.S. at 678) that if a practice has been established for two hundred years, it will take a strong case to make it unconstitutional, but the Court also recognized that a long use does not create a vested right in violation of the Constitution. The decision does not suggest that the fact that a government program that affects religion has been recently adopted makes it constitutionally suspect.

spondingly more indirect and less the "primary effect" of the statute. Furthermore, this Court has stated that where the primary effect of the statute is to benefit the parents, the fact that religiously-affiliated schools may also experience an indirect benefit, through the enrollment of children who would otherwise be unable to attend, is not sufficient to invalidate the statute under the Establishment Clause. *Everson* v. *Board of Education,* 330 U.S. 1; *Board of Education* v. *Allen,* 392 U.S. 236. Rather, by alleviating an economic obstacle to the free choice between a religiously-affiliated school and a public school, the statute exhibits that "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Walz* v. *Tax Commission, supra,* 397 U.S. at 669.

Finally, the tax deduction provisions here involve no excessive government entanglement with religion. The only relation between the State and nonpublic schools required by the Act is that necessary for the State to assure that the schools meet State educational requirements and comply with the non-discrimination provisions of the Civil Rights Act of 1964. Enforcement of such requirements has long been recognized as constitutionally permissible. See *Pierce* v. *Society of Sisters,* 268 U.S. 510, 534.

Accordingly, Sections 4 and 5 of the Act meet the criteria developed by this Court and thus are consistent with the Establishment Clause of the First Amendment.

A. THE TAX DEDUCTION PROVISIONS OF THE ACT HAVE A SECULAR PURPOSE

The Act contains findings expressing the legislature's belief in the importance of a pluralistic society and the vital need for nonpublic schools to provide a competitive and diverse alternative to public schools in order to nurture such a society (JS 50a). In addition, there are findings that reflect the concern of the legislature that a precipitous decline in nonpublic school enrollment and a corresponding increase in public school enrollment "would seriously jeopardize quality education for all children and aggravate an already serious fiscal crisis in public education" (*ibid.*).[8]

The district court correctly recognized that the statutory findings reflect legislative purposes which are "secular in intent" (JS 8a). Cf. *Lemon* v. *Kurtzman, supra,* 403 U.S. at 613. Further, with respect specifically to the tax deduction provisions, the court ruled that they have "a particular secular intent—one of equity—" to give tax relief from the double economic burden placed on citizens who share the expense of maintaining the public schools and who, because of religious belief or otherwise, send their children to a nonpublic school (JS 32–33a). As in *Kurtzman* and *Allen,* there is "nothing here that undermines the stated legislative intent; it must therefore be accorded appropriate deference." *Lemon* v. *Kurtzman, supra,*

[8] Although these findings are contained in Section 2, they are equally applicable to the tax deduction provisions. See note 4, *supra.*

403 U.S. at 613; see *Board of Education* v. *Allen, supra,* 392 U.S. at 243.

B. THE PRIMARY EFFECT OF THE TAX DEDUCTION PROVISIONS OF THE ACT NEITHER ADVANCES NOR INHIBITS RELIGION

To satisfy the Establishment Clause, a statute must not only have a secular purpose; its principal or primary effect cannot be to advance or inhibit religion. The argument that Sections 4 and 5 of the Act have that effect rests upon two propositions: (1) that the tax relief the statute provides constitutes the type of assistance which involves financial support or sponsorship of religion; and (2) that grant of such relief to parents of nonpublic school children, rather than directly to the schools, has the primary effect of advancing religion. Neither proposition is sound.

1. In *Walz* v. *Tax Commission, supra,* the Court upheld, as consistent with the Establishment Clause, property tax exemptions to religious organizations for religious properties used solely for religious worship since such exemptions did not have the primary effect of advancing religion. Although recognizing that "[g]ranting tax exemptions to churches necessarily operates to afford an indirect economic benefit" (397 U.S. at 674), the Court stated (397 U.S. at 675):

> The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries,

or hospitals into arms of the state or put employees "on the public payroll." There is no genuine nexus between tax exemption and establishment of religion.

The tax deductions under the New York statute similarly do not constitute government sponsorship or support of religion. Like the exemption involved in *Walz*, the tax deduction involves no grant of funds by the State, but merely the State's abstention from requiring the payment of certain portions of income taxes which would otherwise be due to it. Indeed, the benefit that religiously-affiliated schools obtain from the tuition tax deductions given to parents of children who attend such schools (see *infra*, pp. 14–15) is more remote than the direct benefit the churches received from the tax exemption upheld in *Walz*.

The nexus between the tax relief involved here and government sponsorship of religion is less than in *Walz*. Here there is only a reduction—and that on a graduated basis—rather than a total forgiveness of taxes, and the recipients of this benefit are the parents of children in any qualifying nonpublic school, religiously-affiliated or secular, and not the religious institution itself.

Thus, *Walz* makes clear that tax relief of the sort involved in Sections 4 and 5 does not constitute financial support or sponsorship of religion.[9]

[9] While the tax deductions features of the Act do not have the same lengthy history as the property tax exemptions upheld in *Walz*, analogous provisions of the federal income tax, which exempt the income of religious organizations and which permit deductions for contributions to religious organizations, have

2. The primary effect of Sections 4 and 5 of the Act is to provide relief for parents from the financial burdens of supporting not only the public schools, but also a nonpublic school system. It is significant that the aid goes to the parent and not to the school. *Lemon* v. *Kurtzman, supra,* 403 U.S. at 621.

While religiously-affiliated schools may receive some indirect benefit from the tax relief provided parents due to the attendance of children whose parents might otherwise be unable to afford private education for them, that fact does not render the Act inconsistent with the First Amendment. In *Everson* v. *Board of Education, supra,* 330 U.S. 1, this Court upheld, as consistent with the Establishment Clause, the reimbursement to parents of money expended for school bus transportation to parochial schools, even though it noted (330 U.S. at 17):

> It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State.

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been an accepted part of our tax system for many years. *Walz* v. *Tax Commission, supra,* 397 U.S. at 678. In *Walz*, the Court noted that since 1894 religious organizations have been expressly exempt from federal income tax (397 U.S. at 676). In addition, the district court pointed out that since 1917 Congress has permitted the deduction of contributions to religious organizations, the purpose of which "is no doubt to encourage such contributions" (JS 35a).

Similarly, in *Board of Education* v. *Allen, supra,* 392 U.S. 236, the Court, in sustaining the constitutionality of the loan of textbooks to children attending religiously-affiliated schools stated (392 U.S. at 244):

> Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution.[10]

In *Tilton* v. *Richardson, supra,* 403 U.S. at 679, the plurality opinion of Chief Justice Burger stated that "[t]he crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion." The decisions of this Court show that the primary effect of Sections 4 and 5 is not the advancement of religion.

3. The task of the Court in accommodating "the internal tension in the First Amendment between the Establishment Clause and the Free Exercise Clause" is "to define the boundaries of the neutral area between these two provisions within which the legislature may legitimately act." *Tilton* v. *Richardson,* 403 U.S.

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[10] Cf. *Zorach* v. *Clauson,* 343 U.S. 306, permitting the release of children from public school to attend programs of religious instruction.

The difference between direct benefits to religiously-affiliated schools and indirect benefits to parents of children attending such schools is more fully discussed in our brief *amicus curiae* in *Sloan* v. *Lemon* and *Crouter* v. *Lemon,* Nos. 72–459 and 72–620, at pp. 13–20.

672, 677 (opinion of Chief Justice Burger). In *Walz v. Tax Commission, supra,* 397 U.S. at 669, the Court stated:

> The general principle deductible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Sections 4 and 5 reflect the appropriate and required governmental neutrality toward religion which furthers the interests underlying the Free Exercise Clause. The religious freedom of a parent who, because of economic considerations, cannot send his child to a religiously-affiliated school of his choice, is to that extent inhibited. By alleviating the economic obstacle inhibiting the free choice between a religiously-affiliated and a public school, the tax deductions advance the free exercise of religion.

Although the Act aids the free exercise of religion, it does not encourage parents to send their children to religiously-affiliated schools, since an education in a religiously-affiliated school will almost always cost more than secular education. In addition, since the same tax benefit is available to parents of children in all qualified nonpublic schools, sectarian or secular, no sect is preferred, nor is religion preferred over non-religion. The State is simply not involved in the parental decisions

upon which the allocations of pupils among various nonpublic schools are made.[11] Therefore, while the tax deductions enhance the ability of a parent to exercise his choice of which school his child will attend, they are completely neutral, since they neither "favor religion over nonreligion, nor sponsor a particular sect, nor try to encourage participation in or abnegation of religion." *Walz* v. *Tax Commission, supra,* 397 U.S. at 694 (opinion of Mr. Justice Harlan).

C. THE TAX DEDUCTION PROVISIONS OF THE ACT DO NOT INVOLVE EXCESSIVE GOVERNMENT ENTANGLEMENT WITH RELIGION

In order for a statute to satisfy the Establishment Clause, it must not involve "an excessive government entanglement with religion". *Walz* v. *Tax Commission, supra,* 397 U.S. at 674. The tax deduction sections of the Act involve no such entanglement.

Sections 4 and 5 create no administrative relationship between government and religion. They impose no obligation on the nonpublic schools and require no action on the schools' part. While only parents of students attending those nonpublic schools which meet State educational requirements and do not discriminate qualify for tax benefits, Sections 4 and 5 involve no additional State entanglement beyond that require-

[11] For this reason, regardless of the accuracy of the figures cited in the brief *amicus curiae* filed by the National Education Association and the Horace Mann League (Brief, n. 7, pp. 14–15), the statute is religiously neutral, since the allocation of pupils among schools depends entirely on parental choice.

ment to determine whether nonpublic schools meet compulsory education standards. These requirements have long been recognized as consistent with the Establishment Clause. See *Pierce* v. *Society of Sisters,* 268 U.S. 510, 534; *cf. Walz* v. *Tax Commission, supra,* 397 U.S. 664.

While excessive entanglement may also result from the divisive political potential of a state program, the tax deduction provisions have no such potential. This program is self-executing and requires no further action on the part of the legislature. In *Walz,* the Court concluded that the grant of tax exemption to churches did not result in excessive government entanglement with religion. It follows *a fortiori* that the grant of tax relief to parents of nonpublic school students do not create an unconstitutional entanglement.

CONCLUSION

For the foregoing reasons, the judgment of the court as to Sections 4 and 5 of Chapter 414 of the 1972 Laws of New York should be affirmed.

Respectfully submitted.

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